

**United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL**

Advice Memorandum

DATE: November 20, 1996

TO : Michael Dunn, Regional Director
Region 16

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Boone & Boone Construction, Inc.
Case 16-CA-18172

524-0183-3367
524-0183-6700

This case was submitted for advice as to whether the Employer made out an adequate defense in explaining its discharge of Hudson, in light of the Board's decision in Wright Line, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981).

FACTS

Boone & Boone (the Employer) is a Tyler, Texas, non-union general contractor. In December 1995 the International Brotherhood of Electrical Workers Local 1151 (the Union) started a salting campaign against the Employer, which at the time was acting as its own electrical subcontractor on at least two jobs.

In November 1995 the Employer hired Michael Hudson, who at the time was not a member of the Union, to work as an electrician on a school job in nearby Longview, Texas. Hudson was not specifically hired as a foreman, but he was told by the owner that he would be running the job. When he started he was the only electrician on the job.¹

Hudson immediately recommended to his boss, superintendent Dennis Fowler, that additional electricians be hired. While Hudson was on the job, two journeymen and two helpers were hired. One of the journeymen was Don

¹ The Region has concluded that Hudson was not a 2(11) supervisor.

Evans, a Union member who concealed that fact from the Employer. According to the Union, Evans were sent to the job with the mission of displacing Hudson as head electrician as part of a salting campaign. Evans would thus be in a position to influence the hiring of other salts.

Evans started work on February 26, 1996. He asserts that during the interview process, he was told that the Employer was not happy with Hudson and that after Evans became familiar with the job, he would replace Hudson as foreman.² Evans said he was not told why the Company was unhappy with Hudson. Evans also said that after Hudson was discharged, Evans was told by superintendent Fowler that Brian Manley, Union business manager, had been visiting the Company jobsites and that the Employer was afraid Hudson had been talking to Manley.

About a week after Evans started work, he talked to Hudson about joining the Union. Hudson said he was interested in obtaining Union wages and benefits, especially the health insurance since his son was sick and he had no insurance. Around that time, Evans told Hudson that Evans was to be his replacement. Hudson admitted that this news was part of his motivation in becoming a Union member. Hudson applied for union membership on March 6 and became a member on March 12. There was no evidence that the Employer knew that Hudson joined.

On March 20 superintendent Fowler told Evans that Hudson was to be fired the next day. Fowler said the reason for Hudson's firing was that Hudson had given the Union the unlisted phone number of another Company foreman.³ Evans then told Hudson what Fowler had said.

² It was never clear that the Company ever designated Hudson as foreman, but he was at least a leadman.

³ What actually happened: Evans got the number on the job and gave it Brian Manley, Union business manager. Manley called the other foreman at home to recruit him for the Union. The other foreman asked where Manley got his number and Manley said from "Mike" at the school job (which was untrue). At the time Hudson was the only "Mike" on that job.

On March 21 Fowler met Hudson as he was arriving for work. Fowler said that he had to make some changes and that he had been up all night worrying about it. He never actually said that Hudson was discharged, but Hudson understood that he was being fired. According to Hudson, he was not given a specific reason for his discharge.

The Employer said Hudson was fired because of his poor performance. The Employer contends that from early in his employment, Hudson was spending too much time talking instead of working. The Company further asserts that Hudson was counseled several times for not doing enough work and for doing it wrong, including conduit and switches which were left out or misplaced. After Evans was hired, the Employer said, Hudson's performance deteriorated further. The Employer states that Hudson also was criticized for working with Evans instead separately, since both were journeymen. The Employer denies any knowledge of Union activity on the part of Hudson before he was fired. The Employer also denies that Fowler told Evans that Hudson was being fired for giving the Union the foremen's unlisted phone number. The Employer also stated that Evans pointed out to Fowler work that Evans had done wrong.⁴

Hudson said that the Employer never complained about the amount or quality of his work. He contended that Fowler urged him to take shortcuts in doing the work, to save money. Hudson also stated that when Evans said he was to replace him, Hudson thought the Company might be planning to move him to another job.

In a tape recording of the March 21 discharge interview, made surreptitiously by Hudson, Hudson referred to himself as having a bad attitude. When he was questioned by the Board agent, Hudson explained that he was telling Fowler that he would have had a bad attitude, if he had known he was training Evans to take his place.

⁴ In a supplemental statement of position, the Employer said for the first time that one reason for firing Hudson was poor attendance.

In an earlier case against the same Employer, 16-CA-17985, the Region issued complaint for the unlawful discharges of two employees, the refusal to hire 12 Union applicants, the refusal to accept applications for two more Union men and for numerous counts of independent 8(a)(1). That case is set for trial on December 16, 1996.

ACTION

Complaint should issue, absent settlement, alleging that the Employer violated Section 8(a)(3) by discharging Hudson because it believed Hudson was engaged in protected concerted activity.

In Wright Line⁵, the Board held that in cases alleging violations of Section 8(a)(3) which turn on employer motivation, the General Counsel must first make out a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in an employer's decision to take adverse action against an employee. The burden then shifts to the employer "to demonstrate that the same action would have taken place even in the absence of protected conduct."⁶ Any error should be resolved in favor of allowing the employee to enjoy the protections of the Act.⁷

In the instant case, we conclude that the evidence establishes that the Employer discharged Hudson because of the Employer's belief that Hudson was in contact with the Union and had given a foreman's unlisted phone number to the Union. In this regard, we note that superintendent Fowler told Evans on March 20, the day before Hudson was discharged, the Hudson was to be fired the next day because Hudson had given the Union the unlisted phone number of another Company foreman.⁸ Further, after Hudson's discharge, Fowler told Evans that the Union business

⁵ 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert denied 455 U.S. 989 (1982), approved in NLRB v. Transportation Management Corp., 462 U.S. 393 (1983).

⁶ Id. at 1089

⁷ American Hospital Assn., 230 NLRB 54, 56 (1977), enfd. 582 F.2d 1283 (7th Cir. 1978).

⁸ We note that although the phone number may have been unlisted, it was posted in plain view..

manager had been visiting the Employer's jobsites and the Employer was afraid Hudson had been talking to him.

We further conclude that the Employer cannot meet its Wright Line defense. The Employer asserts that Hudson was fired because of errors in his work, for productivity reasons, and for talking too much on the job. However, Hudson denies the Employer ever complained about his work, there is no evidence that the Employer put any of its concerns in writing, and Hudson asserts that the so-called errors in his work were merely the result of Hudson's following the Employer's instructions. Finally, the fact that Hudson admitted during his interview in which he was fired that he may have had a bad attitude does not rebut the prima facie case of violation since as discussed above, there is insufficient evidence that the Employer would have fired Hudson in the absence of his protected activity.

Finally, we note that the Union has admitted that its goal was to get Hudson fired so that Evans could take over his job and thus influence hiring of additional Union salts. Hudson was not a member of the Union at that time. To this end, Evans told Fowler of alleged work errors by Hudson, and Union business manager Manley falsely told a company foreman whose unlisted number he had obtained from Evans, that **Hudson** had given him the number. As noted above, the Employer's belief that Hudson was in contact with the Union and had given the phone number to Manley was a reason for Hudson's discharge. Such conduct would arguably violate Section 8(b)(2). Hudson should be made aware of these circumstances and of his right to file a charge.

B.J.K.